LE COPY

Office-Supreme Court, U.S.
FILED
MAY 24 1961
JAMES R. BROWNING, Clerk

No. 921

In the Supreme Court of the United States

OCTOBER TERM, 1960

LEAVELL & PONDER, INC., and MORGAN COMPANY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Rule involved	2
Statement	3
Argument	7
Conclusion	11

CITATIONS

Cases:

Buena Vista Homes, Inc. v. *United States*, 281 F. 2d 476	3
United States v. *Benning Housing Corporation*, 276 F.2d 248	3
United States v. *Bobinski*, 244 F.2d 299	9
United States v. *Buhler*, 254 F.2d 876	9
United States v. *Cunningham*, 246 F.2d 330	9
United States v. *Theimer*, 199 F.2d 501	8
United States v. *2,477.79 Acres of Land in Bell County, Texas*, 259 F.2d 23	9
United States v. *Vater*, 259 F.2d 667	8, 9
United States v. *Waymire*, 202 F.2d 550	9

Rule:

Federal Rules of Civil Procedure, Rule 71A(h): 2, 3, 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 921

LEAVELL & PONDER, INC., and MORGAN COMPANY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 1-25) is reported at 286 F.2d 398.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1961. A timely petition for rehearing was denied on March 7, 1961. The petition for a writ of certiorari was filed on April 24, 1961. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the particular location, quantity, or character of a Wherry Housing project which had been condemned by the United States in this case did not justify the district court's rejection, pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure, of the government's request for a jury trial and the appointment of a commission to evaluate the property.

2. Whether the court of appeals erred in overturning the award of the commission because it was based on three sets of assumptions, each of which was without evidence to support it in vital particulars.[1]

RULE INVOLVED

Rule 71A(h), Federal Rules of Civil Procedure, provides in pertinent part as follows:

> If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor

[1] A third question sought to be presented by petitioners as to whether original cost is admissible in valuing Wherry Housing projects (Pet. 5-7) is, in our view, not presented by the record in this case (see *infra*, p. 10, note 4).

within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. * * *

STATEMENT

This is a proceeding by the United States to condemn the lessee interests of petitioners Leavell & Ponder, Inc., and Morgan Company, Inc., in the long-term leases of a Wherry housing development.[2] Petitioners owned identical halves of the entire development.

In the district court, the United States demanded a trial by jury (R. 11).[3] The district court on its own motion, however, appointed a commission under Rule 71A(h), F.R.Civ.P. (R. 33-35). The United States filed exceptions to the appointment, which were overruled by the district court (R. 35, 37-38).

After trial, held from January 5 through January 16, 1959, the commission made its report on October 2, 1959 (R. 152-160). The commission made its

---

[2] The legislative background and general nature of Wherry Housing projects have been discussed in the opinions of the courts of appeals in this case, in *United States* v. *Benning Housing Corporation*, 276 F. 2d 248 (C.A. 5), and in *Buena Vista Homes, Inc.* v. *United States*, 281 F. 2d 476 (C.A. 10).

[3] "R." refers to the printed record in the court of appeals.

determination of the fair market value on three bases (R. 159):

(a) The commission considered the "[l]oss sustained (one-half of project) by using net income projected over economic life of improvements, before income taxes, reduced to present value. $996,670.91." The commission stated that it had projected the income for the remaining 43 years of economic life and found this sum to be $6,615,341.38 for each half of the development. "The present value of such sum, using published tables of present value of $1.00 at what the Commission finds to be the proper interest rate of 4½% * * * compounded annually for 43 years, for each one half is $996,670.91, which sum, we find to be the Owner's loss" (R. 157).

(b) The commission also took into account the "[l]oss sustained (one-half of project) by using net income projected over economic life of improvements, after Federal Income Taxes, reduced to present value, the income being used as 'non-taxable'. $1,062,607.75." The commission stated that it had considered "that if the purchaser of such property were a corporation it would pay an income tax of 52% * * *. The projected income above shown $6,615,341.38 less the calculated income tax leaves a balance of $3,411,863.86 * * *. The Commission has then used this figure and considered it as 'non-taxable' income to ascertain what a prudent buyer would be required to invest in non-taxable securities to obtain the above figure. It is the Commission's opinion that an earning rate of 2 and ¾% would be proper, and it has

therefore reduced such net 'non-taxable' income to a 'present value' using published tables as heretofore stated and arrived at the Owner's loss of $1,062,-607.75, for each one-half of the property" (R. 157).

(c) The commission also considered the 1953 sale of the entire capital stock of Morgan Company for $172,000 cash, plus 10.34 acres in fee and an option to purchase two tracts of 50.93 and 5.77 acres (R. 110). The contract of sale gave the purchaser of the stock the option of paying the entire consideration in cash, $217,000, or giving the cash and exchange of property stated above (R. 110). Mr. Ponder, one of the parties to the transaction, stated that "In my opinion the value of the land and options to purchase land conveyed to the Morgans in consideration of the purchase of the common capital stock * * * was approximately $900,000.00. In addition to those conveyances, there was the cash that was given" (R. 294). In the opinion of the other party to the transaction, Mr. Morgan, the value in April 1953 of the land traded was 51 acres of residential land at $3,400 per acre and 700,000 square feet of commercial land at $1 per square foot (R. 137-138). The $172,000 cash was considered, among other things, as providing the $105,000 necessary to exercise the options to purchase the land exchanged (R. 142). Both parties testified, however, that, for purposes of federal income tax and federal documentary tax, the transaction was treated at the stated consideration of $217,000 (R. 139, 373-374, 382-383). The commission said in its report that the testimony of Mr. Ponder and Mr. Morgan "has been accepted as that

of competent local investors, to the value of the assets exchanged in the transaction * * *" (R. 156). The commission found the consideration exchanged for the one-half interest owned by the Morgan Company to be $940,000 and, after adjustments for "subsequent mortgage annual retirements, and diminished by sustained economic depreciation, and including cash consideration of $172,000," this figure was increased to $977,266.47 (R. 159).

Based on the above three considerations, the report found the value of each half of the development to be $977,266.47, or a total of $1,954,532.94 (R. 159-160). The United States filed extensive objections to the award and the report of the commission (R. 161-167). These were overruled by the district court and judgment was entered approving, affirming, and adopting the report (R. 190-191).

The court of appeals reversed the district court's judgment, holding that all three of the Commission's bases of evaluation were erroneous. The reliance on the 1953 sale of the Morgan Company interests was held to be erroneous because "there was no substantial proof of the values of the two interests in land transferred in partial payment of the Morgan property" (Pet. App. A, 17). Second, the method wherein the commission capitalized the income over the next 43 years as if it would be received in a lump sum at the end of 43 years and its present value determined by using a capitalization rate of 4½% was adjudged erroneous because (a) it was clear from the record that the income would be received over the life of the lease; (b) the lowest capitalization rate in evidence was 6% and no wit-

ness had testified that a 4½% interest rate would be proper; and (c) the finding that 4½% would be the capitalization rate demanded by an investor for the equity in a housing project "borders on the ridiculous" (Pet. App. A, 19-20). Third, the court of appeals found that the commission's capitalization of income after taxes was erroneous because there was no evidence (a) that a prospective purchaser would be a corporation paying an income tax of 52% or an individual paying at least that much tax, or (b) that "a rate of return of 2¾%, after deduction of 52% of the total net income 'would be proper'" (Pet. App. A, 20).

After having concluded that the award made by the commission was not supported by competent evidence and must be set aside, the court of appeals stated that the district court had erred in submitting the case to a commission. While the court of appeals did "not consider it necessary to reverse the judgment solely" because of this error, it determined the issue because the case was already being reversed on the merits (Pet. App. A, 22). The court of appeals considered the circumstances of this particular case and found that there was nothing in the record to warrant the reference to a commission.

ARGUMENT

1. The petitioners first challenge (Pet. 3-5) the court of appeals' statement, which was not the basis of the reversal of the district court's valuation (see *supra*), that this case should have been tried by a jury instead of by a commission. But this de-

termination merely applied Rule 71A(h) of the F.R. Civ. P. (*supra*, pp. 2-3)—which both parties admit is applicable—to the facts of this case. The court of appeals found that "the character, location, or quantity of the property to be condemned, or * * * the interest of justice" (Rule 71A(h)) did not require the submission to a commission. This is not an issue warranting further review by this Court. In any event, we submit that the court of appeals' decision was correct.

Under the provisions of Rule 71A(h), F.R. Civ. P., itself the discretion of the trial court to choose between trial before a jury or trial before a commission is very limited. The Rule preserves the special methods of trial which are provided by various federal statutes. Absent such a statute, three methods of trial are possible. Either party has the right to demand trial by jury; if neither does so, the case is tried before the court. It is only when a party insists on a jury trial that the court has any authority to utilize a commission. *United States* v. *Vater*, 259 F. 2d 667, 671, note 1.

The courts of appeals have repeatedly emphasized the limited authority of trial courts to order trial before a commission. *United States* v. *Theimer*, 199 F. 2d 501, 503-504 (C.A. 10), on which the court below relied (Pet. App. A, 25), held:

> [T]he parties to a condemnation proceeding are ordinarily entitled to a jury under Rule 71A(h) as a matter of right and that where demand is made for the same the judge must grant a jury trial, unless under the facts as they appear in

> the case because of the character, location, or quantity of the property to be condemned, or for other reasons revealed by the facts of the case, the interest of justice warrants the submission of question of value and compensation to a commission.
>
> * * * While the trial court is vested with a sound discretion in determining whether the ordinary or the extraordinary provisions of the Rule should be employed in a given case, which judgment should not be disturbed on appeal save for cogent reasons, its discretion is not an unlimited or an absolute one and is subject to review and will be set aside for abuse thereof.

Numerous other cases have likewise held that a party to a condemnation proceeding is ordinarily entitled to a jury trial as a matter of right, or else have interpreted the rule as prescribing trial by jury as the usual and customary procedure to be followed if demanded, or have stated that exceptional circumstances must exist to justify refusal of a demand for a jury trial. *United States* v. *2,477.79 Acres of Land in Bell County, Texas*, 259 F. 2d 23, 26 (C.A. 5); *United States* v. *Buhler*, 254 F. 2d 876, 879 (C.A. 5); *United States* v. *Cunningham*, 246 F. 2d 330, 332 (C.A. 4); *United States* v. *Vater*, 259 F. 2d 667, 671 (C.A. 2); *United States* v. *Bobinski*, 244 F. 2d 299, 301 (C.A. 2); *United States* v. *Waymire*, 202 F. 2d 550, 552 (C.A. 10).

The United States made a timely demand for a jury trial and was entitled to such a trial as of right unless, as Rule 71(A)(h) provides, trial before a commission is required by "the character, location, or

quantity of the property to be condemned, or for other reasons in the interest of justice * * *." This case does not involve a large number of separate tracts, many small landowners, great distances from the courthouse, or any of the other factors usually relied on to justify use of a commission. As the court of appeals found (Pet. App. A, 25), the issue as to the compensation payable for the taking of a single tract of land can be made easily understandable to a jury. Therefore, the court of appeals properly directed that the trial of the issue of just compensation in this case should be in the usual form before a judge and jury.

2. The petitioners contend (Pet. 7) that the findings of the commission were supported by ample evidence. Whether the court of appeals correctly viewed the evidence presented at the trial does not present a question which warrants further review by this Court. This is especially true where, as here, there is no final determination but the case is merely remanded for a new trial.[4]

---

[4] The petitioners' argument (Pet. 5-7) about whether original cost should be admissible in the valuation of Wherry Housing projects is not properly before the court as the commission did not rely on original cost, and no appeal was taken by the United States on this issue. The statements by the court of appeals are dictum.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys.

MAY 1961.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 595308 1347